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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC., Respondent, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 675, Charging Party.	Case Nos. 28-CA-22914 and 28-CA-22915 **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, LOCAL 675'S STATEMENT OF POSITION FOLLOWING REMAND FROM D.C. CIRCUIT**

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I. INTRODUCTION

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675 ("Union") submits this statement of position in response to the Board's decision to accept the remand of the United States Court of Appeals for the D.C. Circuit. *Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710 (D.C. Cir. 2012). In its decision, the D.C. Circuit set aside the Board's determination that Medco Health Solutions of Las Vegas, Inc. ("Medco" or "Employer") violated Section 8(a)(1) of the Act by threatening employee Michael Shore ("Shore") for wearing a union t-shirt that expressed criticism of a non-monetary incentive program. The Court remanded the case, holding that the Board must better explain its refusal to find that special circumstances permitted the Employer's prohibition of the union t-shirt.

As discussed below, the Board should re-affirm the extremely narrow application of the special circumstances exception to the venerable right of employees to wear and display union apparel commenting on terms and conditions of employment. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In doing so, the Board should further elucidate the limited nature of its decisions in *Pathmark Stores, Inc.*, 342 NLRB 378 (2004), and *Noah's New York Bagels, Inc*., 324 NLRB 266 (1997). And ultimately, the Board should re-affirm its prior holding that Medco violated Section 8(a)(1) by threatening Shore.

II. ARGUMENT

A. *Pathmark Stores, Inc.* and *Noah's New York Bagels, Inc.* Are Not Inconsistent With the Board's Conclusion That Special Circumstances Are Not Present Here

The D.C. Circuit found that the Board failed to provide a "meaningful analysis" for rejecting Medco's argument that special circumstances justified prohibiting employee Shore from wearing his union t-shirt. 701 F.3d at 717. The Court questioned whether the Board's decision was consistent with *Pathmark Stores* and *Noah's New York Bagels*, which it read as permitting a limitation on wearing union apparel where an employer raises the possibility of harm to its relationship with customers. 701 F.3d at 717.The Court suggested that the "WOW" program's role in Medco's pitch to clients, along with the tone of the slogan, "I don't need a WOW to do my job," appeared sufficient under the Board's prior rulings to establish evidence of special circumstances. 701 F.3d at 717. In light of this finding, the Court remanded the case to the Board with instructions to better explain why *Pathmark Stores* and *Noah's New York Bagels* do not compel a different result under the facts of this case. *Id.* at 718.

Pathmark Stores and *Noah's New York Bagels* are not, however, inconsistent with the Board's decision here, and the Board should further elucidate the limited nature of these prior rulings. Both *Pathmark Stores* and *Noah's New York Bagels* fit comfortably with the long line of decisions applying the special circumstance doctrine only to employees who have significant contact with the public and/or wore buttons or t-shirts containing obscene or inflammatory content or messages disparaging the employer's product or service. Both cases, unlike the instant case, turned on potential customer

confusion about the employer's product, and the retail setting in which the union apparel was displayed to the employer's customers. These critical distinctions explain why the Board applied the special circumstances doctrine in *Pathmark Stores* and *Noah's New York Bagels* but not in this case. *See Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at *2 (2011).

In *Pathmark Stores,* the Board held that an employer could prohibit its employees from wearing a union t-shirt which prominently displayed the message "Don't Cheat About the Meat!" 342 NLRB at 379. There, the slogan was clearly displayed on the union t-shirts in a public grocery store operated by the employer, and the customers shopping at the store could have easily read the message as they shopped. 342 NLRB at 379. The Board concluded that the "retail setting," "the particular slogan involved[,] and its reasonably likely effect on customers" established a special circumstance that justified prohibiting employees from wearing the "Don't Cheat About the Meat!" t-shirt. *Id.* The concern in *Pathmark Stores* was that customers coming into the market might think something was wrong with the meat they were buying or that they were possibly being cheated when they bought it. *Id.*

Likewise, in *Noah's New York Bagels*, the Board found that an employer could lawfully prohibit its employees from wearing a union t-shirt that contained the message, "If its [sic] not Union, its not Kosher." 324 NLRB at 275. The concern in *Noah's New York Bagels*, as in *Pathmark Stores*, was that the message on the t-shirt was critical of the employer's kosher food products and mocked the employer's kosher policy. Therefore, it was reasonable to permit the employer to prohibit the union t-shirt as the shirt could

legitimately undermine Noah's relationship with its customers, some of whom observed strict kosher food practices. *See* 324 NLRB at 275.

Here, unlike in *Pathmark Stores* and *Noah's New York Bagels,* Shore worked in a facility completely closed to the public, and the "WOW" t-shirt did not criticize Medco's pharmacy services or products, but rather, an employee incentive program – a clear term or condition of employment. Thus, there is no concern here, like there was *Pathmark Stores,* that Shore's union t-shirt with the slogan "I don't need a WOW to do my job" might confuse a customer about Medco's product or might prompt a customer to conclude that Medco was "cheating" them. There is also no concern that clients visiting Medco's facility, however infrequent, might be offended by or interpret the slogan "I don't need a WOW to do my job" as an appeal to ethnic prejudices like in *Noah's New York Bagels.* Indeed, the slogan could not reasonably be interpreted as anything but a mild criticism of Medco's employee incentive program. That is particularly true in light of the fact that Medco explains the WOW program in detail to current and potential clients on tours of its facility. Thus, the same concerns that were present in *Pathmark Stores* and *Noah's New York Bagels* about potential customer confusion about the employer's product are simply not present in this case.

Moreover, while Medco does take clients and prospective clients on tours of its facility, tours occur only on a sporadic basis, sometimes as often as two or three times in one week, and some weeks not at all. Slip op. at 2. Employees typically are notified ahead of time that a tour is scheduled. *Id.* at fn. 7. Bargaining unit employees also never interact with people taking tours, and tours passed no closer than eight feet from Shore's

work area. Tr. 217:17-22 (Shore); Tr. 301:6-22 (Shanahan). Based on the nature of these tours, therefore, it is extremely unlikely that Medco's clients would ever even see the union t-shirt in the first place.[1] The same set of concerns that were present in *Pathmark Stores* and *Noah's New York Bagels* about exposing the employer's customers in a public, retail setting on a daily basis to a message critical about the employer's product are simply not at issue here.

Where, as here, a union t-shirt displays a slogan expressing a harmless criticism about a term or condition of employment, employees' broad right to wear union apparel must trump an employer's business interest in limiting or prohibiting that apparel. *Cf. Pathmark Stores, Inc.*, 342 NLRB at 379 ("In this retail setting, given the particular slogan involved and its reasonably likely effect on customers, we agree that the Respondent established that its legitimate interest in protecting its customer relationship outweighed any legitimate interest of employees in wearing the 'Don't Cheat About the Meat!' T-shirts."). To hold otherwise would render the special circumstances exception hollow. Indeed, if merely raising the possibility of harm to customer relationships was sufficient to establish special circumstances, then employers could regularly prohibit employees from wearing all types of union apparel while at work. Such a conclusion is

[1] To be clear, Medco's facility is not a traditional pharmacy, but rather a mail order pharmacy and call center. Therefore, consumers do not visit the facility to pick up their prescriptions or come face to face with Medco employees. As the ALJ noted, "prescriptions are filled in a highly automated process and then mailed to the consumer. As a result, there is no face to face interaction with Medco's employees and the consumers." Slip op. at 5. This is yet an additional ground to distinguish the current case from *Pathmark Stores* and *Noah's New York Bagels,* as the employers there operated

(Footnote continued)

no doubt contrary to the longstanding rule, established by the Supreme Court in *Republic Aviation Corp.*, protecting the right of employees to wear and display union apparel commenting on terms and conditions of employment.

Such a conclusion would also be contrary to the Board's prior rulings on this issue, which have uniformly held that "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees." *Guard Publ'g Co. v. NLRB*, 571 F.3d 52, 61 (D.C. Cir. 2009) (quoting *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999)); *see also Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) ("[M]ere employee contact with customers does not, standing alone, justify an employer prohibiting the wearing of union buttons or insignia."); *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) ("[C]ustomer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia."); *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988) ("Mere speculation by [the employer's] Vice President . . . that the Company might potentially lose customers if its employees wore insignia for the Union does not establish the requisite 'special circumstances' that would justify a band of such insignia.").

For all of the these reasons, *Pathmark Stores* and *Noah's New York Bagels* are not inconsistent with the Board's decision here, and the Board should re-affirm its prior holding that the Employer violated Section 8(a)(1) by threatening Shore for wearing the union t-shirt.

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public stores visited regularly by consumers.

B. Special Circumstances Exist Only Where An Employer's Legitimate Business Interests Outweigh Employees' Strong Interest in Wearing Union Apparel While At Work; The Board Should Re-affirm the Extremely Narrow Application of the Special Circumstances Doctrine

The D.C. Circuit also concluded that the Board failed to provide a "meaningful analysis" for rejecting Medco's argument that special circumstances justified prohibiting employee Shore from wearing his union t-shirt. 701 F.3d 717. While the Board dispensed with Medco's special circumstances argument in just one short paragraph, the Board's conclusion was consistent with longstanding Board precedent. Slip op. at 2. Accordingly, the Board should re-affirm its ultimate conclusion in this case, and also confirm the extremely narrow application of the special circumstances doctrine. *Bell-Atlantic Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enf.* 99 Fed. Appx. 233 (D.C. Cir. 2004); *Nordstrom, Inc.*, 264 NLRB at 700; *P.S.K. Supermarkets*, 349 NLRB at 35. Indeed, in light of the D.C. Circuit's confusion, the Board must closely guard against the possibility that this narrow doctrine will gradually become the exception that swallows the rule.

The Section 7 right of employees to wear union apparel in the workplace was established long ago in *Republic Aviation*. 324 U.S. at 801-03. The Supreme Court initially developed this right by balancing employees' rights to exercise the protections of Section 7 against the right of employers to manage their businesses in an orderly manner. *Id.* at 801-03. In short, the Supreme Court affirmed the right of employees to display apparel commenting on terms and conditions of employment even though such apparel might interfere in some way with an employer's preferred manner of operating its business. For this reason, the Board has repeatedly held that "[a]bsent 'special

circumstances' an employer cannot prohibit its employees from wearing union insignia, buttons, or T-shirts while at work." *See, e.g., North Hills Office Services, Inc.*, 346 NLRB 1099, 1113 (2006). Special circumstances exist only where union apparel "may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic*, 339 NLRB at 1086; *see also P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007).

Here, under this standard, the Board determined that Medco had "not offered any evidence that the slogan reasonably raised '*the genuine possibility of harm to customer relationship.*'" Slip op. at 1-2, 7-8 (emphasis added). The D.C. Circuit, however, found this analysis lacking because it concluded that Medco had presented "considerable evidence" that Shore's "WOW" t-shirt could damage Medco's customer relationships. 701 F.3d at 716-17.

As discussed above, however, the Board and the courts have never allowed such speculative arguments or evidence about customer exposure to union insignia, like the one adopted by Medco here, to prove that special circumstances existed. *NLRB v. Mead Corp.*, 73 F.3d 74, 80 (6th Cir. 1996) (message not unlawful simply because it served as a "constant irritant" to management) (citations omitted); *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 fn. 6 (1982) ("Respondent's argument that it was justified in proscribing union button wearing by its employees because it feared that some of its customers or potential customers might react adversely or withhold their trade, is without

merit."); *Mack's Supermarkets*, 288 NLRB at 1098 ("Mere contact with customers is not a basis for barring the wearing of insignia for a union"); *see also World Color (USA) Corp.*, 360 NLRB No. 37, 2014 WL 559195, at *16 fn. 3 (2014).

Instead, the Board examines "the entire circumstances" of a situation "to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display." *Nordstrom, Inc.*, 264 NLRB at 700. Under this standard, an employer can generally only establish special circumstances where, for example, the message on the clothing is vulgar, profane, or disparages the employer's product. *Bell-Atlantic*, 339 NLRB at 1086; *Mead Corp.*, 73 F.3d at 79-80 (citations omitted); *Mack's Supermarkets*, 288 NLRB at 1098. It is only in these cases that an employer's legitimate interest in its business outweighs employees' legitimate interest in wearing union apparel commenting on terms and conditions of employment. *See Pathmark Stores*, 342 NLRB at 379.

In this case, there is no dispute that Shore's union t-shirt, which read "I don't need a WOW to do my job," is not vulgar or profane, and does not even arguably disparage Medco's product or pharmacy services. Slip op. at fn. 8 (concluding that the message on Shore's t-shirt was "neither vulgar nor obscene"). Instead, the shirt expressed mild criticism of a working condition, and it is that criticism – and only that criticism – that drew the Employer's ire. *Id.* Shore's wearing of the union t-shirt was no doubt protected under the Act.

In addition, Medco's special circumstances argument is seriously undermined by the lack of evidence it submitted in support of its position. The Employer – which bears

the burden of proof – put forth no evidence of customer complaints, or actual or potential harm to its image. *Mead Corp.*, 73 F.3d at 76 (6th Cir. 1996) (employer must prove special circumstances with "substantial evidence"). Medco simply argued that because Shore could have "been seen by a customer or prospective customer" on a tour, its relationship with customers was damaged. Medco's Final Reply Brief to D.C. Circuit, pp. 7-8. This contention, however, is belied by the fact that bargaining unit employees never interact with people taking tours, and tours passed no closer than eight feet from Shore's work area. Tr. 217:17-22 (Shore); Tr. 301:6-22 (Shanahan). Because Shore's work area was not a common stop on the Employer's tour route, his wearing of the "WOW" t-shirt posed no actual, legitimate threat to Medco's business interest.

In sum, Medco's bare assertions that the union t-shirt harmed its relationship with customers do not, without more, establish special circumstances, and the Board should not countenance the D.C. Circuit's expansion of the special circumstances doctrine in this way.

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III. CONCLUSION

For the foregoing reasons, the Board should re-affirm the extremely narrow application of the special circumstances exception. The Board should also further clarify the limited nature of its decisions in *Pathmark Stores* and *Noah's New York Bagels* and re-affirm its prior holding that Medco violated Section 8(a)(1) by threatening Shore.

DATED: April 14, 2015

Respectfully submitted,

GILBERT & SACKMAN
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By s/ Michael D. Weiner

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DECLARATION OF SERVICE

I, the undersigned, am over the age of eighteen years and not a party to this action. My business address is GILBERT & SACKMAN, A LAW CORPORATION, 3699 Wilshire Blvd., Suite 1200, Los Angeles, CA 90010. On April 14, 2015, I served the following document:

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC, LOCAL 675'S STATEMENT OF POSITION FOLLOWING REMAND FROM D.C. CIRCUIT**

Pursuant to Section 102.114(i) of the Board's Rules and Regulations, I served the above document by sending it by electronic mail, addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and was executed by me in Los Angeles, California on April 14, 2015.

s/ Michael D. Weiner